LIBRARY SUPREME COURT, U. S.

No. 506

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1963.

FRANK ADAMS & CO., ET AL.,
Appellants,

vs.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,
Defendants,

and

BALTIMORE & OHIO RAILROAD CO., ET AL.,
Intervening Defendants.

On Appeal from the United States District Court
for the Southern District of Ohio,
Western Division

MOTION TO AFFIRM.

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Pursuant to Rule 16, paragraph 1(c), of the Revised Rules of this Court, The Baltimore & Ohio Railroad Company; The Chesapeake and Ohio Railway Company; Grand Trunk Western Railroad; The New York Central Railroad Company; The New York, Chicago and St. Louis Railroad Company; Norfolk and Western Railway; The Pennsylvania Railroad Company; Pittsburgh & Lake Erie Railroad Company and Reading Company, defendants in

the proceedings before the Interstate Commerce Commission and intervenors-as-defendants in the Court proceeding below, move that the judgment of the District Court be affirmed.

STATEMENT.

This is a direct appeal from the final judgment of a three-judge district court dismissing appellant's suit to set aside an order of the Interstate Commerce Commission (*Institute of Scrap Iron & Steel, Inc.* v. *Akron, C. & Y. R.*, 316 I.C.C. 55). In that proceeding, before the Commission, appellant alleged violations of Sections 1(4)(5) and 3(1) of the Interstate Commerce Act in the rail carrier defendants' maintenance of rates on scrap between points in official territory. The Commission dismissed the complaint on the ground that the assailed rates were not shown to be unjust, unreasonable, or otherwise unlawful. The Commission in its report made detailed findings of fact, based on the record, in support of its order of dismissal (316 I.C.C. 55, 66-67).

Appellant points out that rates on scrap have been the subject of Commission review in over forty proceedings up to 1952. Since that date at least four more cases have been decided by the Commission (J. S., pp. 10-13). The Commission pointed out in its report that the present basis of rates on scrap reflects some rates "much below the level reflecting 70 per cent of the iron and steel rates which had been prescribed as reasonable maximum" (313 I.C.C. 55, 57-58). The Commission in its report also found that its "prescription in specific cases from and to particular points did not affect all the rates on scrap iron within official territory as the commodity-rate structure which reflected origin and destination grouping provided many rates lower than the prescribed maximum" (313

I.C.C. 55, 57). Appellant admits that a lower basis of rates on scrap than that found reasonable in all of these cases before the Commission was sought by it in the present litigation (J. S. p. 7).

Appellant states that it has secured voluntary revisions in rates on scrap in territories other than those served by these intervening defendants (J. S. p. 6). The Commission pointed out in its report denying appellant relief that the southwestern and southern rates which apparently are satisfactory to appellant are "considerably in excess of the average level on scrap here assailed" (316 I.C.C. 55, 67).

The Court below found that "the Commission's conclusions that the assailed rates had not been shown to be unjust, unreasonable or otherwise unlawful are based upon adequate findings supported by substantial evidence, and that they are neither arbitrary nor unreasonable and that there is a rational basis for the Commission's said conclusions" (J. S. pp. 23-24).

ARGUMENT.

This appeal presents no substantial question warranting plenary consideration by this Court.

Appellant asserts that the scrap rate structure has become chaotic by the "abrogation" of the Newport News formula (Question 1). What the Commission did was to refuse to disregard the record and years of precedent and prescribe rates lower in level than those previously found lawful. Orders of the Commission should not be set aside, modified or disturbed by a court on review if they be within the scope of the Commission's statutory authority and are based upon adequate findings even though the court might reach a different conclusion on the facts presented. *United States* v. *Pierce Auto-Freight Lines,* 327 U.S. 515, 535-536.

Appellant urges that scrap is in an unfinished condition and thus should take lower rates than steel, a finished article, and cites in support thereof *United States* v. *Gulf Refining Company,* 268 U.S. 542. It should be noted that the Court there stated that "a lower rate properly *may* be applied to a product when in an unfinished condition than that applicable to it when finished." (Emphasis supplied). The rule applicable to the facts here presented is stated in *Mid States Steel & Wire Co.* v. *Baltimore & O. R. Co.,* 296 I.C.C. 278, 280, where the Commission found that rates on raw materials are not necessarily unreasonable simply because they are higher than the rates on the finished product where the rate on the finished product is depressed in order to meet competitive conditions. The Commission in its report here found that "truck competition on manufactured iron and

steel articles is much more severe than on scrap, and is effective at substantially all distances whereas motor transportation of scrap is concentrated largely in the shorter hauls, principally to assembly yards" (316 I.C.C. 55, 64).

Appellant finally states that "if scrap rates are not to be related to rates on manufactured iron and steel, pig iron and iron ore, what then is to be the measuring gauge" (J. S., p. 13). The Commission found that "the transportation characteristics of iron ore, pig iron, manufactured iron and steel, and scrap differ widely" (316 I.C.C. 55, 67). Appellant had the burden of proof before the Commission. The Commission in its expertise found squarely on the facts against appellant.

Appellant finally urges that it was deprived of a fair hearing since it was denied the right of cross-examination (Questions 2-3). Appellant first objects to the Commission's reliance upon so-called generalized statistics. In this connection, it should be pointed out that the Commission is the trier of facts. *Transamerican Freight Lines, Inc.* v. *United States,* 51 F. Supp. 405 (1943). While it is true that the Commission's findings must be supported by the evidence before it, it is the Commission's function, and not the court's, to weigh that evidence and the Commission's findings of fact must be sustained if supported by any substantial evidence. *National Auto. Transporters Assn.* v. *United States,* 121 F. Supp. 289 (1954); *U. S.* v. *Pan American Corp.,* 304 U.S. 156 (1938); *Alton Railroad Company* v. *United States,* 315 U.S. 15, 23 (1942); *United States* v. *Pierce Auto-Freight Lines,* 327 U.S. 515 (1946). The Commission is the expert body designated by Congress to determine such technical and complicated questions of fact. *Board of Trade of Kansas City* v. *United States,* 314 U.S. 534, 546 (1942). As the tribunal appointed by law,

and informed by experience, the Commission here did find upon consideration, of all evidence of record that the rates were not shown to be unlawful. In this connection also, when cross-examination was attempted to go beyond the so-called generalized statistics, the examiner applied the very simple rule of evidence that cross-examination could not go beyond the scope of the direct examination. See the ruling of the Court below. See also *Zumwalt* v. *Gardner*, 160 F. (2d) 298, 303, (6 Cir.), where it is stated that "it is a rule of the Federal courts that the cross-examination of a witness is confined to matters touched on in his direct examination." (Rule 43(b) of the Federal Rules of Civil Procedure).

As to the one cited instance, the cross-examination of John C. Howard, the record shows at page 244, the next page after the record reference given by appellant, that the question asked was not answered since the witness stated he was without knowledge to answer.

Appellant urges that its appeal presents important issues of substance and procedure. Such is not the case. The complaint case before the Commission was handled in its usual orderly manner and the Commission simply followed precedent in refusing to prescribe rates on a lower basis than that previously approved by it. The matters of procedural importance urged by appellant are of no moment since the Commission followed simple and normally applied rules of evidence. See the opinion of the Court below.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the judgment of the District Court should be affirmed.

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PROOF OF SERVICE.

I, Robert H. Bierma, one of the attorneys for the Rail Carrier Defendants herein and a member of the Bar of the Supreme Court of the United States, hereby certify that I have this day served the foregoing document upon all parties of record in this proceeding, and also upon the Solicitor General, Department of Justice, Washington 25, D. C., by mailing by air mail a copy thereof, properly addressed to said parties.

Dated at Chicago, Illinois, this 18th day of October 1963.

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ROBERT H. BIERMA